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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 264

O. M. TATE, JR., Trustee of Leeds Homes, Inc., *et al.*,
Petitioner,

v.

NATIONAL ACCEPTANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Additional Statement of Facts	1
Questions Presented	2
Argument	3–11
1. The Tennessee Statute as Construed by the Tennessee Courts Does Not Apply to or Affect the Enforceability of an Interstate Transaction by a Non-Qualified Foreign Corporation. It Is Immaterial That the Corporation May Also Be Engaged in Intra-State Activities	4–7
2. Even Assuming That the Interstate Loan Would Not Have Been Enforceable in the Tennessee Courts, the Loan Is a Valid and Subsisting Claim Under Tennessee Law and Is Therefore Allowable in the Leeds Bankruptcy Proceeding. The Bankruptcy Law and Not the Tennessee Statute Governs the Allowability of a Valid Claim	7–11
Conclusion	11

CITATIONS

CASES: PAGE

American Surety Co. v. Sampsell, 327 U.S. 269 (1946) 10

Angel v. Bullington, 330 U.S. 183 (1947) .. 10

Biggs v. Reliance Life Ins. Co., 137 Tenn. 598, 195 S.W. 174 (1917) 7

Burton Explosives, Inc. v. Strider, 25 Tenn. App. 440, 158 S.W.2d 731 (1941) 5, 6

Cunnyngham v. Shelby, 136 Tenn. 176, 188 S.W. 1147 (1916) 7

David Lupton's Sons Company v. Automobile Club of America, 225 U.S. 489 (1912) .. 9

Deposit Bank of Monroe County, Ky. v. Cherry, 20 Tenn. App. 305, 98 S.W.2d 521 (1936) 5, 6, 7

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 8, 9, 10

Hollingshead Co. v. Baker, 4 Tenn. App. 362 (1926) 5, 6

Holmberg v. Armbrecht, 327 U.S. 392 (1946) .8, 10

Holston National Bank v. Missionary Society, 11 Tenn. App. 72 (1929) 6

In re V.I.D., Inc., 198 F.2d 392 (7th Cir. 1952) 3, 10

Kelley, Glover & Vale, Inc., Trustee v. Kramer, 344 U.S. 914 (1953) 3

Lloyd Thomas v. Grosvenor, 144 Tenn. 847, 233 S.W. 669 (1921) 5, 6

PAGE

Lummus Cotton Gin Co. v. Arnold, 151 Tenn. 540, 269 S.W. 706 (1925) 7

Milan Milling & Mfg. Co. v. Gorten, 93 Tenn. 590, 27 S.W. 971 (1894) 5

Norton v. Union Bank & Trust Co., 46 S.W. 544 (1898) 6

Prudence Realization Corporation v. Geist, 316 U.S. 89 (1942) 10

Shoenterprise Corporation v. Butler, 46 Tenn. App. 302, 329 S.W.2d 361 (1959) 6

Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S.W. 879 (1899) 7

Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946) 3, 8, 10

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 10

STATUTE:

Tenn. Code Ann. § 48-908 (1929) 2, 4, 9

OTHER CITATION:

23 AM. JUR., *Foreign Corporations*, § 335, p. 313 (1940) 9

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has now been reported in 332 F.2d 648. The District Court's opinion is reported in 222 F. Supp. 20.

ADDITIONAL STATEMENT OF FACTS

We agree with petitioner that the facts are not in dispute and are fully set forth in the District Court opinion (33a-43a). In the Court of Appeals both parties accepted the District Court's findings, and the decision of the Court of Appeals is accordingly made on these undisputed findings.

Petitioner's summary of the District Court's findings (Pet., pp. 4-6) is, however, incomplete. It neglects to state the important finding of the District Court that the loan was an "interstate transaction" (53a-54a). Nor does it mention the facts upon which this finding was based: The loan application, the loan agreement and all other loan papers were signed by Leeds in Tennessee and transmitted to respondent's home office in Chicago for approval and acceptance (37a-39a; 21a-22a). They were subject to acceptance and were, in fact, accepted by respondent in Chicago (38a, 53a, 22a). The proceeds of the loan were disbursed from Chicago and the note itself was payable in Chicago (22a).

Petitioner characterizes the manner in which the loan was made as a "device" to avoid Tennessee taxes and usury laws (Pet., p. 12). The District Court's findings are to the contrary. It found that the loan was "bona fide completed in Chicago" and "not merely as a ruse or design to evade the Tennessee foreign corporation laws" (53a); and that "this particular agreement was not made in bad faith and fraudulently to evade the Tennessee usury laws" (55a).

QUESTIONS PRESENTED

Petitioner's statement of the questions presented by this case is neither accurate nor complete. The two questions presented, as stated by the Court of Appeals, are:

1. Does the Tennessee statute (Tenn. Code Ann. § 48-908), making it unlawful for a non-qualified corporation to engage in "intra-state business," apply to or affect the enforceability of an interstate commercial loan from a non-qualified Delaware corporation to a Tennessee corporation?

2. Assuming that the interstate loan would not have been enforceable by suit in the Tennessee courts, is the lender precluded by the Tennessee statute from proving its claim in the borrower's bankruptcy proceeding?

ARGUMENT

The District Court decided both questions in favor of respondent. It held (1) the loan being an interstate transaction, the Tennessee statute did not apply and the loan was enforceable in both the Tennessee and federal courts (53a-54a), and (2) even if the Tennessee statute were applicable the loan would not be void but merely unenforceable by suit in the state courts; accordingly the Tennessee statute would not prevent enforcement of the loan in a bankruptcy proceeding where jurisdiction is not based on diversity (46a-52a).

The Court of Appeals noted that if the District Court's decision on either question was correct, the decision should be affirmed. It upheld the District Court decision on the second question and found it unnecessary to pass upon the first.

The District Court's decision on both questions is clearly correct. Moreover, the first question (which is decisive of the case) involves only the construction of a Tennessee statute. It involves no question arising under the Constitution or under any federal statute. The District Court's construction of the Tennessee statute follows the uniform decisions of the courts of that state. These decisions are binding as to the meaning of the Statute.

The decisions of both courts on the second question, that the Tennessee statutes, if applicable, would not make the loan void, also follow the Tennessee decisions. In holding that this valid claim was enforceable in the Leeds bankruptcy, the courts below followed the rule of *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946), that federal and not state law applies in determining the allowance of claims in bankruptcy. The identical issue was decided in the same manner by the Seventh Circuit in *In re V.I.D., Inc.*, 198 F.2d 392 (7th Cir. 1952), and *certiorari* was refused. *Kelley, Glover & Vale, Inc., Trustee* v. *Kramer*, 344 U.S. 914 (1953).

1. The Tennessee Statute as Construed by the Tennessee Courts Does Not Apply to or Affect the Enforceability of an Interstate Transaction by a Non-Qualified Foreign Corporation. It Is Immaterial That the Corporation May Also Be Engaged in Intra-State Activities.

The petition for *certiorari* is based entirely on the incorrect assumption that respondent's loan would not have been enforceable in the Tennessee courts. Thus, petitioner asserts that because respondent had not qualified in Tennessee, Leeds "would have had an effective defense to the assertion of the lien had there been no bankruptcy and had the suit been in a state court" (Pet., p. 9).

Petitioner's assumption is contrary to both the plain language of the Tennessee statute and the construction given to it by the Tennessee courts. The loan was, as the District Court found, an interstate transaction. This finding is based on undisputed evidence and is decisive of the case. The Tennessee statute by its terms applies only to intra-state transactions: it merely makes it unlawful for a non-qualified foreign corporation "to engage in *intra-state business* in this state" (Tenn. Code Ann. § 48-908).[1]

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[1] The text of Tenn. Code Ann. § 48-908 is as follows:

> "*Penalty for engaging in business without qualifying.*—It shall be unlawful for any foreign corporation to engage in intrastate business in this state without complying with §§ 48-901—48-906, and such corporation shall forfeit and pay to the state of Tennessee a penalty of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), such penalty to be fixed by the jury trying the case. Actions for the recovery of such penalties shall be instituted and prosecuted by the attorney-general on behalf of the state of Tennessee by civil suit before any court of competent jurisdiction. Each day during which any such corporation engages in business without complying with the provisions of this chapter shall constitute a separate violation."

The fine imposed by § 48-908 is the only statutory penalty provided for a violation of the statute. The Tennessee courts have held, however, that contracts of a non-qualified corporation that are subject to the statute (i.e., intra-state contracts) may not be enforced in the Tennessee courts. See Sixth Circuit opinion.

The Tennessee decisions, without exception, construe the statute as applying only to intra-state transactions and, hence, as not precluding a non-qualified corporation from enforcing an interstate transaction in the Tennessee courts. *Lloyd Thomas* v. *Grosvenor*, 144 Tenn. 347, 233 S.W. 669 (1921); *Burton Explosives, Inc.* v. *Strider*, 25 Tenn. App. 440, 158 S.W.2d 731 (1941), *cert. den.*, 2-7-42; *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d 521 (1936), *cert. den.*, 12-4-36; *Hollingshead Co.* v. *Baker*, 4 Tenn. App. 362 (1926), *cert. den.*, 1927; *Milan Milling & Mfg. Co.* v. *Gorten*, 93 Tenn. 590, 27 S.W. 971 (1894).

The Tennessee rule confining the statute to intra-state transactions has been strictly applied. Thus the Tennessee courts have uniformly held that the statute does not prevent a non-qualified corporation from suing on any interstate transaction even though it is also doing a substantial intra-state business in Tennessee. *Lloyd Thomas* v. *Grosvenor*, 144 Tenn. 347, 233 S.W. 669 at 671 (1921); *Burton Explosives, Inc.* v. *Strider*, 25 Tenn. App. 440, 158 S.W.2d 731 at 734 (1941), *cert. den.*, 2-7-42; *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d 521 at 525 (1936). Under the Tennessee decisions the test in every case is not the general activities of the foreign corporation in Tennessee but whether the *particular* transaction is interstate or intra-state; if it is "not an intra-state transaction but an interstate transaction . . . our statutes respecting foreign corporations have no application to it," and it is immaterial that the corporation may also be "carrying on a portion of its ordinary business in the state." *Lloyd Thomas* v. *Grosvenor*, 144 Tenn. 347, 233 S.W. 669 at 671 (1921).

Even when a single sale by a non-qualified foreign corporation involves both intra-state and interstate transactions, the Tennessee courts hold that the statute does

not prevent a suit and recovery on the interstate portion. *Hollingshead Co.* v. *Baker*, 4 Tenn. App. 362 (1926), *cert. den.*, 1927.

Petitioner attempts to distinguish the foregoing cases on the ground that they did not involve loans (Pet., pp. 12-13). The Tennessee courts make no such distinction. On the contrary, they have specifically held that interstate loans, like interstate sales, are not affected by the Tennessee statute. *Shoenterprise Corporation* v. *Butler*, 46 Tenn. App. 302, 329 S.W.2d 361 at 363 (1959); *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d 521 (1936); *Holston National Bank* v. *Missionary Society*, 11 Tenn. App. 72 (1929), *cert. den.*, 3 7 30. As in the case of other interstate transactions the Tennessee courts hold that the lender's right to sue on an interstate loan is unaffected by the fact that it "had been and was doing some substantial part of its ordinary business in Tennessee in violation of statute." *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d at 525 (1936). See also *Norton* v. *Union Bank & Trust Co.*, 46 S.W. 944 (1898), and the discussion, in that case, at p. 946, of two unreported decisions of the Supreme Court of Tennessee.

Nothing in the Tennessee statute or in any Tennessee decision supports petitioner's assertion that "the determining factor is whether the foreign corporation has agents in the state." In fact, the *Burton*, *Hollingshead* and *Cherry* cases involved situations in which the plaintiff did have agents in the state but in each instance the court held that this circumstance did not make the statute applicable since the transaction was, in fact, an interstate one.

We do not concede and the District Court did not find that respondent is or ever has been doing an intra-state business in Tennessee in connection with other loans.

Whether it was or was not is irrelevant under the Tennessee statute and the decisions of the Tennessee courts since the loan to Leeds was unquestionably an interstate loan.

2. Even Assuming That the Interstate Loan Would Not Have Been Enforceable in the Tennessee Courts, the Loan Is a Valid and Subsisting Claim Under Tennessee Law and It Is, Therefore, Allowable in the Leeds Bankruptcy Proceeding. The Bankruptcy Law and Not the Tennessee Statute Governs the Allowability of a Valid Claim.

Both courts below held that under Tennessee law a non-qualified foreign corporation's contracts, if subject to the statute, are not void but are merely unenforceable in the Tennessee courts. This is clearly a correct determination of Tennessee law as decided by the Supreme Court of Tennessee. *Singer Mfg. Co.* v. *Draper*, 103 Tenn. 262, 52 S.W. 879 (1899); *Biggs* v. *Reliance Life Ins. Co.*, 137 Tenn. 598, 195 S.W. 174 (1917); *Cunnyngham* v. *Shelby*, 136 Tenn. 176, 188 S.W. 1147 (1916); *Lummus Cotton Gin Co.* v. *Arnold*, 151 Tenn. 540, 269 S.W. 906 (1925). These authorities uniformly hold that a contract of a non-qualified foreign corporation is valid but that as a penalty for noncompliance with the statute the Tennessee courts will not lend their aid in enforcing it.

Contrary to petitioner's assertion (Pet., pp. 8-9), there is no conflict in the Tennessee decisions on this point. As noted by both courts below, the allegedly conflicting Tennessee authorities involve mere *dicta* in cases in which the precise question was not presented (Ct. of App. Pet., p. 17; Dist. Ct., 50a-51a).

Since the loan was valid under Tennessee law, both courts below held that its allowance in bankruptcy was to be determined by the Bankruptcy Act and not by Tennessee law. In so holding the courts below followed the rule of *Vanston Bondholders Protective Committee* v.

Green, 329 U.S. 156 (1946), that in bankruptcy, as distinguished from diversity cases, the only question to be determined by state law is whether the claims of creditors "are valid and subsisting obligations against the bankrupt at the time the petition in bankruptcy is filed." *Id.* at 161. Once this preliminary question has been determined in favor of the claim, its allowance is to be determined exclusively by the Bankruptcy Act. In *Vanston* the court said:

> "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R.R.* v. *Tompkins*, 304 U. S. 64, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenshp (sic) should adjudicate controversies as if it were only another state court. *See Holmberg* v. *Armbrecht*, 327 U.S. 392. But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles." (329 U.S. at 162-163)

Under Tennessee law respondent's loan was a valid and subsisting claim against Leeds at the time the petition in bankruptcy was filed. Nothing in the Bankruptcy Act disqualifies respondent from proving its claim or prohibits its allowance in bankruptcy. Nor does the Tennessee statute even purport to do so. The statute (if applicable at all) goes no further than to close the Tennessee courts to a non-qualified corporation. It leaves the corporation's rights otherwise unimpaired, including the right to enforce the valid contract in bankruptcy or in any other court.[2] Even if it had attempted to do so, Tennessee could not prescribe the qualifications of a claimant in a federal bankruptcy court.

For the foregoing reasons it was settled law before *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), that a state statute, which did not make contracts of a non-complying foreign corporation void but merely disqualified the corporation from suing thereon in the courts of the state, did not prevent the corporation from maintaining an action in the federal courts. *David Lupton's Sons Company* v. *Automobile Club of America*, 225 U.S. 489 (1912).[3] Insofar as diversity cases are concerned this rule became obsolete under the doctrine adopted by *Erie* that in diversity cases a federal court is, in effect, another court of the state in which it sits and hence cannot "entertain suits in diversity cases that could not be brought in the respective state courts." *Angel* v. *Bullington*, 330 U.S. 183, 192 (1947); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Both the *Angel* and *Woods* decisions, how-

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[2] Many states have statutes which by their express terms or by judicial construction are similar to Tenn. Code Ann. § 48-908. It is well settled that since such statutes did not make the contract void they do not prevent the non-complying corporation from maintaining a suit thereon in another state. 23 AM. JUR., *Foreign Corporations*, § 335, p. 313 (1940), and cases cited therein. See also the discussion of this question in *David Lupton's Sons Company* v. *Automobile Club of America*, 225 U.S. 489, 499-500 (1912).

[3] In the *Luptons Sons* case Mr. Justice Hughes stated with respect to a New York foreign corporation statute similar to the Tennessee statute:

> "It must follow, upon the similar construction of § 15 as it read at the time of the transaction in question, that the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. . . . The State in the statute before us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case*, was a disability to sue 'in the courts of New York.'" (225 U.S. at 499-500.)

ever, carefully limit their holding to cases in which jurisdiction is founded upon diversity of citizenship, and this Court has held that the *Erie* rule is not applicable to cases in which jurisdiction arises under the Bankruptcy Act. *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946). That case holds that a bankruptcy court does not sit "as if it were only another state court" but "must administer and enforce the Bankruptcy Act as interpreted by this court . . . to determine how and what claims shall be allowed under equitable principles." *Id.* at 162-163. See to the same effect, *American Surety Co.* v. *Sampsell*, 327 U.S. 269 (1946); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *Prudence Realization Corporation* v. *Geist*, 316 U.S. 89 (1942).

In re V.I.D., Inc., 198 F.2d 392 (7th Cir. 1952), *cert. den.*, 344 U.S. 914 (1953), is squarely in point. It involved the allowance, in a bankruptcy proceeding in the District Court for Indiana, of mortgage bonds issued pursuant to a trust indenture with a foreign corporation which had not qualified to do business in Indiana. The Seventh Circuit concluded that under Indiana law, like Tennessee law, the contracts of a non-qualified corporation are not void but are merely unenforceable in the Indiana courts (198 F.2d at 394-395). The court recognized that under the *Woods* case the Indiana statute would also prevent suit on the claim in a diversity case in the federal court. It held, however, on the authority of the *Vanston* case, that a bankruptcy court is "not governed by state laws" and that the claim was, therefore, enforceable in the bankruptcy proceeding.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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